

(2011) 09 CAL CK 0050

Calcutta High Court

Case No: Writ Petition No. 24419 (W) of 2008

Hirapada Das

APPELLANT

Vs

The Calcutta Port Trust and
Others

RESPONDENT

Date of Decision: Sept. 28, 2011

Acts Referred:

- Calcutta Port Trust Employees (Pension) Regulations, 1988 - Regulation 6, 7, 7(1), 7(2)
- Major Port Trusts Act, 1963 - Section 28
- Penal Code, 1860 (IPC) - Section 419, 420

Hon'ble Judges: Sambuddha Chakrabarti, J

Bench: Single Bench

Advocate: Mukul Lahiri, Subhendu Banerjee, Abdul Hamid Shaikh and Kamal Banerjee, for the Appellant; Saptangshu Basu and Saugata Bhattacharya, for the Respondent

Final Decision: Allowed

Judgement

Sambuddha Chakrabarti, J.

The Petitioner is an ex-employee of the Calcutta Port Trust, the Respondent No. - 1 herein. He joined his service in the year 1964. He retired in the year 2002.

2. Quite some time after his retirement the Petitioner was charge-sheeted in the year 2003 on the ground that he had secured his employment under the Respondent No. 1 herein in the name of Sri Haripada Das, whereas his actual name was Biren Das. It was alleged that by this the Petitioner had defrauded the Trustees of the Respondent No. 1 for illegal gain and exhibited lack of integrity and gross misconduct unbecoming of an employee of the Respondent No. 1. This was followed by a departmental enquiry. He was found guilty. By an order, dated June 13, 2005/June 17, 2005, the Financial Advisor & Chief Accounts Officer who is the Respondent No. - 3 herein directed that the entire pension of the Petitioner was to be withdrawn permanently with immediate effect. The said order which has been

annexed to the writ petition as Annexure- P-5 mentioned that the same was issued with the approval of the Chairman under Rule 7 (1) of Calcutta Port Trust Employee's (Pension) Regulations 1988.

3. The Petitioner has given an explanation for his conduct. He says that Haripada Das was his elder brother. The Petitioner was registered with the concerned Employment Exchange wrongly and mistakenly as Haripada instead of Harapada. Biren was his nick name. Haripada and Harapada were two brothers. Since these two names were phonetically close to each other the Employment Officer had committed a mistake in recording his name as Haripada instead of Harapada. Haripada is an employee of Bata India Ltd.

4. The Petitioner affirmed an affidavit in the year 1991 declaring his name as Harapada, and the name of the elder brother as Haripada and that due to mistake of the concerned Employment Officer his name was recorded as Haripada. He had sworn this affidavit to rectify his name in the service record and the Employment Exchange Card to avoid future complications.

5. The Petitioner's further explanation is a family incident of marital disharmony of his youngest daughter which, according to the Petitioner, was at the root of all problems. He says that his daughter was compelled to leave her matrimonial home due to the ill treatment at the hands of her husband and was living with the Petitioner. A disgruntled son-in-law as an act of retaliation lodged a false complaint with the Respondents alleging impersonation against him.

6. The Petitioner has further challenged the decision of the competent authority as the result of a complete non-application of mind which was also disproportionate in nature. The Enquiry Officer did not give due importance to the documents exhibited and also refused to accept some documents intended to be filed by him.

7. The Petitioner submitted various representations praying for active consideration of his punishment. His wife also made several representations to the Chairman of the reviewing authority for releasing the pension so that the entire family might survive.

8. The writ Petitioner inter alia prayed for a writ in the nature of Mandamus directing the Respondents not to give effect to the order of punishment passed by the Respondent No. 3.

9. The Respondents have used an Affidavit-in-Opposition denying the allegations of the Petitioner. The affidavit discloses that after the retirement of the Petitioner a complaint was received by the Finance Department of the Respondent No. - 1 that the Petitioner had impersonated himself and secured an employment under the Respondent No. - 1 in the name of his elder brother. According to the complainant the real name of the Petitioner was Biren Das. This complaint was followed by another complaint of a political person.

10. The Vigilance department of the Respondent No. - 1 held an enquiry and the allegation was found to be correct. As per order of the Chairman who is the Respondent No. - 2 herein, a charge-sheet was drawn up against the writ Petitioner relating to the misconduct of impersonation in the matter of securing employment. A First Information Report was also lodged with the Officer-in-Charge, Hare Street Police Station and a criminal proceeding was initiated against the Petitioner under Sections 419/420 of the Indian Penal Code. The Respondents denied the allegation that they had failed to take any step towards the payment of the retrial benefits. On the contrary, all retrial benefits as were admissible to the Petitioner had already been paid. The charge-sheet was served upon the Petitioner and the enquiry proceeding was held in terms of the Regulations 6 and 7 of Calcutta Port Trust Employee's (Pension) Regulations 1988 (hereinafter refer to as the Regulations, 1988) and the Calcutta Port Trust Employee's (Classification, Control and Appeal) Regulations 1987.

11. To the Affidavit-in-Opposition of the Respondents the Petitioner has filed an Affidavit-in-Reply. He mostly reiterated his statements made in the petition. He also repeated his case that due to mistake his name was recorded as Haripada instead of Harapada in the Employment Exchange Card and that his nick name was Biren Das. As such the Petitioner did not suppress his name. According to the Petitioner under Regulation 7 of the Regulations, 1988, the Chairman, i.e. the Respondent No. - 2, did not have the authority to suspend the pension permanently when there was no pecuniary loss or the charged employee was not found guilty of any grave misconduct.

12. At the hearing of the petition it was submitted by the Petitioner that the Regulations, 1988 have a statutory character as the same was made by the Board of Trustees for the Port of Calcutta in exercise of the powers u/s 28(b) of the Major Port Trusts Act, 1963.

13. It was submitted by the Petitioner that under Regulation 7 (1) the Chairman reserved to himself the right of withholding or withdrawing the pension or part thereof whether permanently or for a specified period. Thus the power was vested only in the Chairman and it was his prerogative to pass such an order. This right cannot be delegated to any other authority as the relevant Regulations do not contain any provision for such delegation. According to the Petitioner the Respondent No. - 3 by issuing the impugned order have usurped the statutory function of the Respondent No. - 2 and such act were beyond the scope of the relevant Regulation.

14. Mr. Mukul Lahari, the learned Advocate appearing for the Petitioner, further assailed the order impugned which mentioned that the same was issued with the approval of the Chairman. According to him there was no provision for passing an order with the approval of the Chairman. Such approval did not make it an order of the Chairman as the order impugned was passed by the Respondent No. 3, i.e. an

authority other than the Chairman. Mr. Lahari, the learned Advocate, relied on an oft-repeated principle of law that when the law requires a thing to be done in a certain manner it should either be done in that manner or not at all. Once a mode of doing an act is prescribed, other modes of performance are necessarily excluded. As such the impugned order passed by the Respondent No. - 3 is a nullity in the eye of law.

15. Mr. Saptangsu Basu, the learned Advocate appearing for the Respondents, has supported the action taken by his clients. According to him the misconduct alleged against the Petitioner was a continuing one and therefore it does not come within the mischief of Regulation 7 (2) (b) of the concerned Regulation, 1988. A continuing wrong is never time barred. The Petitioner had very consciously and knowingly impersonated himself he did not nothing to rectify it during his entire service career. The explanation given by the Petitioner was thoroughly unacceptable and at most this was an attempt to cover up his own wrong. The act on the part of the Petitioner was the misconduct of the highest order by which the Respondents have been defrauded.

16. According to Mr. Bose, an order passed with the approval of the Chairman is a valid compliance of the requirement of the concerned Regulation. The contention was that after the order had received the approval of the Chairman this was as good as an order passed by him.

17. The relevant Regulation No. - 7 (1) of the concerned Regulations clearly inter alia says that the Chairman reserves to himself the right of withholding or withdrawing the pension or part thereof whether permanently or for a specified period if in any departmental or judicial proceeding the pensioner is found guilty of grave misconduct or negligence during the period of service, including service upon re-employment after retirement.

18. The concerned Regulation has thus given this exclusive authority to the Chairman. Considering the gravity of the punishment and the consequences that may follow the framers of the Regulations must have thought it just and proper that such a power is to be exercised by none other than the top man of the set-up upon his satisfaction. A close look at the Regulations, 1988 suggests that these Regulations apply only to a pensioner. and the question of withholding or withdrawing pension arises only if he is found guilty of grave misconduct or negligence during the period of service etc. and that is why the Regulation postulates that the Chairman "reserves to himself" this particular right and if this right is exercised by any authority other than the Chairman it will obviously be an invalid exercise of power without jurisdiction. It is now a settled principle of law that an order passed without jurisdiction is a nullity. and in this case since this order passed by the Financial Advisor & Chief Accounts Officer is also without jurisdiction the same is clearly a nullity. The Financial Advisor & Chief Accounts Officer must have had a misconception that he was competent under the Regulations to issue the

impugned order.

19. Pursuant to the direction passed by this Court the relevant records of the case were produced from which it appears that the authority which had issued this order i.e. the Respondent No. 3 herein, had given a note on June 13, 2005 to the effect that "as Disciplinary Authority, I recommend to withdraw entire pension for which Chairman's approval is required under Rules 7 (1) of the C.P.T. Employee's (Pension) Regulation, 1988. Submitted please." On the very next day i.e. June 14, 2005, the Chairman had noted that he had perused the records and he approved the proposal.

20. The argument about the compliance with the requirements of Regulation 7 (1) of the concerned Regulations is entirely misplaced. The misconception of the provisions of the Regulation was also very clear from the note of the Respondent No. 3 that his recommendation as a Disciplinary Authority was required to be approved by the Chairman under Regulation 7 (1) and therefore he had submitted the same before the Chairman for the approval. and the Chairman too in his turn had merely approved the proposal. Thus both the Chairman and the Financial Advisor & Chief Accounts Officer were under a serious misconception about the requirements of the relevant provision. It was not appreciated that this was a right which the Chairman had reserved unto himself. This was a jurisdiction which the Chairman alone was competent to exercise. If such power was to be exercised it was to be done by him and him alone.

21. Instead, we find the Respondent No. 3 recommending a proposed punishment against the Petitioner and he thought that the Regulation required it to be "approved" by the Chairman. It is worth mentioning that the Chairman did not even consider it necessary to record his satisfaction as to why the decision of permanently withdrawing the entire pension of the Petitioner had been taken. It is now a settled principle administrative of law that every administrative action must be informed with reasons. The importance of recording reasons cannot be overstated. While considering the validity of certain orders passed u/s 113 of the Tamil Nadu Town and Country Planning Act, 1971, the Supreme Court in the case of The Consumer Action Group and Another Vs. State of Tamil Nadu and Others, observed:

29. Whenever any statute confers any power on any statutory authority including a delegatee under a valid statute, howsoever wide the discretion may be, the same has to be exercised reasonably within the sphere that statute confers and such exercise of power must stand the test to (sic) judicial scrutiny. This judicial scrutiny is one of the basic features of our Constitution. The reason recorded truly discloses the justifiability of the exercise of such power. When such a wide power is given to any statutory authority including a delegatee then it is obligatory on the part of such authority to clearly record its reason in the order itself for exercising such a power. Application of mind of such authority at that point of time could only be revealed

when order records its reason. Even if Section is silent about recording of reason, it is obligatory on the Government while passing orders u/s 113 to record the reason.

22. Thus the satisfaction of the competent authority must be reflected in the order itself. An order which does not record any reason for passing the same or does not reflect the mind of the authority is bad indeed. Such decision is undoubtedly an unjust exercise of power. This is all the more true in respect of a matter adversely affecting the rights of an employee. The Chairman has merely approved a proposal of the Respondent No. 3 without appreciating the scope and ambit of Regulation 7 (1). In the process he failed to appreciate that the power has been reserved to himself and such power is not to be exercised by any other authority.

23. The order impugned has been annexed to the writ petition as Annexure P- 5. The date given to it is June 13, 2005. This order was issued by the Respondent No. 3. This he signed on June 17, 2005 as it appears from the date he put below his signature. The last two paragraphs of the order are:

Therefore, I order that the entire pension of Shri Das to be withdrawn permanently with immediate effect.

This is issued with the approval of the Chairman under Rule 7 (1) of Calcutta Port Trust Employee's (Pension) Regulations 1988.

24. It is very interesting to note that it was the Respondent No. 3 who had thus ordered the permanent withdrawal of the pension. We have seen that the Chairman's approval was received on June 14, 2005. Thus on the day this order was typed and prepared, maybe it was not signed, the approval of the Chairman was yet to be received. This suggests that after making the recommendation and placing the file to the Chairman this order was drafted and typed. The Respondent No. 3 must have thought that the approval of the Chairman was a matter of course. Therefore, everything was kept ready to issue the order. Nothing was left to the Chairman for an independent exercise of his power.

25. The entire course of conduct on the part of the Respondents reveals an unfortunate state of affairs. The requirements of the relevant Regulation had been given a complete go-bye. The Respondents exhibited a total non-application of mind. The Chairman's authority had been usurped by an officer subordinate to him. Such usurpation of his authority received the Chairman's sanction and confirmation. The Respondent No. 3 should have appreciated that it was not for him to order the withdrawal of pension permanently. and the Chairman failed to appreciate that it was not for him to approve an act which he had reserved to himself.

26. Approval, as the very word suggests, means an act of confirmation of something that has taken place already. Thus when the Chairman had approved the "proposal" he was not really exercising his own authority. He was merely confirming what the

Respondent No. 3 had recommended.

27. In this connection the learned Advocate for the Petitioner has referred to the case of *Vine v. National Dock Labour Board* reported in (1956) 3 All E. R 939 for a proposition that the concerned local board had no power to delegate its disciplinary functions. This decision of the House of Lords is it not applicable to the facts of this case as it does not appear from the records that the Chairman had delegated his power to any other authority. On the contrary, what is revealed in this case was an act of usurpation and its subsequent approval by the very same authority which should have exercised the power.

28. In the decision of *Ashok Kumar Das and Ors. v. University of Burdwan and Ors.* reported in 2010 (2) C.H.N. (S.C.) 144, the Supreme Court had occasion to consider the meaning of the word "approval". Their Lordships held:

In Black's law Dictionary (Fifth Edition), the word "approval" has been explained thus: "the act of confirming, ratifying, assenting, sanctioning, or consenting to some act" or thing done by another?. Hence, approval to an act or decision can also be subsequent to the act or decision.

29. Thus an approval which is later in point of time, is different from the act done. The Chairman's approval has not altered the fact that an act which was specially required to be done by himself, irrespective of whether he has approved it or not, was not after all his own act. Thus the requirements of Regulation 7 (1) have been violated and violated quite grossly.

30. It is also the grievance of the Petitioner that as per the relevant Regulation the proceeding initiated against him after his retirement could be taken only in respect of an event which took place not more than four years before the initiation of the proceeding. He relies on Regulation 7 (2) (b) of the Regulations which says that the departmental proceeding if not instituted while the employee was in service, whether before his retirement or during the re-employment, shall not be instituted save with the sanction of the Chairman and shall not be in respect of any event which took place more than four years before such institution. According to the Petitioner the charge-sheet issued against him mentioned that his alleged misconduct had taken place on June 27, 1964 when he joined the service in a wrong name. To the submission on behalf of the Respondents that the act complained of was a continuing offence the Petitioner submits that it was never mentioned that the continuation of the alleged misconduct till date of retirement or the issue of the charge-sheet was a charge against him. The Petitioner insisted that a charge-sheet involving punitive consequences and alleging misconduct should be strictly construed.

31. There is substance in the points raised by the Petitioner. The statements in the Articles of Charge framed against the Petitioner shows that he was charged with misconduct as he had secured his employment on April 22, 1964 in the name of

Haripada Das whereas his actual name was Biren Das and thereby he had defrauded the Trustees for the Port of Calcutta for illegal gain. It was charged against him that by this act the Petitioner exhibited lack of integrity and gross misconduct unbecoming of an employee of the Calcutta Port Trust. Neither the charge-sheet nor the statement of imputation of misconduct ever disclosed that this was a continuing offence and if the authorities had meant it to be so there was nothing preventing them from bringing a specific charge to that effect. But in the absence of any such specific charge it will be inequitable to hold him guilty of something he was never charged with.

32. After all the Petitioner had no occasion to meet a non-existing charge. Not only the charge-sheet was silent no witness on behalf of the management deposed at the enquiry that the act complained of against the Petitioner or its effect was continuing till then. The Petitioner too was never given any suggestion in course of his cross-examination to this effect either. and now to hold him guilty on the ground of a continuing offence would amount to altering the charge against the Petitioner.

33. Moreover, the language of Regulation 7 (2) (b) is very specific. Disciplinary proceeding can be initiated only in respect of an "event" which took place four years before. In other words, initiation of the proceeding is restricted to an "event" occurring within four years before such initiation. This fixes a time frame of an "event" in respect of which the proceeding can be taken within four years. It may be appropriate to refer to the Division Bench judgment of the Allahabad High Court in Dr. Ram Vilas Panday v. State of U.P. and Ors. reported in 1994 (4) S.L.R. 403. There also the Petitioner was served with a notice after his retirement in respect of an event occurring many years ago. The Civil Service Regulations applicable to that case also contained a stipulation in respect of the outer limit of time as in the present case. It was held that on the basis of the events which took place in the year 1979-80 it was not proper for the Respondents to issue the impugned notice. Applying the same principle it can also be held that the proceeding initiated against the Petitioner is barred by limitation as provided in Regulation 7 (2) (b) of the Regulations, 1988.

34. The learned Advocate for the Respondents took a point that the issues raised at the hearing of the case were not pleaded by the Petitioner. It is true that a factual issue which has not been specifically pleaded is not allowed to be raised for the first time at the time of argument. But such restriction does not apply to the consideration of a pure question of law founded upon undisputed questions of facts pleaded. It is equally a settled law that a pure question of law can be agitated at any stage irrespective of whether it was pleaded or not provided it does not require any adjudication on factual issues. The questions raised by the Petitioner involve pure questions of law based upon the facts disclosed and do not require any exploration of any other factual issue. As such, the Petitioner is entitled to raise the same at the stage of hearing on the undisputed factual aspects on the basis of the pleadings of

the parties.

35. Thus the order impugned in this writ petition cannot be sustained. This is a fit case where the power of judicial review is to be exercised. It is now a settled law that an administrative order which does not take into consideration statutory requirements or travels outside that is certainly subject to the permissible limits of judicial review. In view of what have been discussed above, as prayed for by the Petitioner, the order assailed in the writ petition is liable to be set aside.

36. The writ petition succeeds and the order impugned is thus set aside.

37. In the facts of this case there shall be no order as to costs.